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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
Application by SBC Communications Inc.,	)	
Southwestern Bell Telephone Company	)	CC Docket No. 97-121
and Southwestern Bell Communications	)	
Services, Inc. d/b/a Southwestern Bell	)	
Long Distance for Provision of In-Region	)	
InterLATA Services in Oklahoma	)	

REPLY COMMENTS OF BELL ATLANTIC[1]

In passing the 1996 Act, Congress had one overriding objective: to open all telecommunications markets to competition, including the local and long distance markets alike. In keeping with that goal, the Act permits a Bell operating company to provide in-region long distance service once it has opened its local market to competition by satisfying each of 14 items in a statutorily prescribed checklist, and has made each of those items available, or offered to make them available, to competing local exchange providers.

Despite these straightforward statutory requirements, a number of parties here ask the Commission to override the decisions made by Congress, and to erect a series of anticompetitive regulatory barriers to new long distance competition. For example, they claim that the Commission should add new requirements to the checklist despite an explicit statutory prohibition against doing so, and should reinvent the Act's public interest standard to include

[1] "Bell Atlantic" includes Bell Atlantic-Maryland, Inc.; Bell Atlantic-New Jersey, Inc.; Bell Atlantic-Pennsylvania, Inc.; Bell Atlantic-Virginia, Inc.; Bell Atlantic-Washington, D.C., Inc.; Bell Atlantic-West Virginia, Inc., and Bell Atlantic Communications, Inc.

requirements that are unrelated to the long distance authorization being sought, or that were expressly rejected by Congress.

ARGUMENT

I. Efforts To Rewrite The Specific Statutory Requirements Imposed By Congress Must Be Rejected

Not content with the standards actually adopted by Congress in section 271, the long distance incumbents urge the Commission effectively to rewrite both the specific provisions of section 271(c)(1) that govern when a Bell operating company is entitled to apply for relief, as well as those of section 271(c)(2) that govern the separate question of what a Bell company must show to demonstrate that its local market is sufficiently open to qualify for long distance relief.

A. The Act's Standards For When a Bell Company Is Entitled To File For Relief Are Clear

On the issue of when a Bell company is entitled to apply for relief, the long distance incumbents again press their claim that a Bell operating company is barred from applying under Track B whenever any competitors "have timely made and pursued requests for interconnection," AT&T Br. 5, and that Track B is available only "[i]f not a single potential competitor requests an interconnection agreement," MCI Br. 16.

This extreme construction simply cannot be squared with the express terms of the Act. See Bell Atlantic Br. 8-14; NYNEX Resp. to ALTS 5-6. A Bell operating company may apply under section 271(c)(1)(A) — the so-called Track A alternative — if it is providing interconnection under one or more state approved agreements with "competing providers of telephone exchange service . . . to residential and business subscribers" that offer service "either

exclusively . . . or predominantly over their own telephone exchange service facilities." Alternatively, it may apply under section 271(c)(1)(B) — the so-called Track B alternative — if "no such provider" — that is, the kind of provider described in 271(c)(1)(A) — has made a timely request for "the access and interconnection described in subparagraph (A)."[2]

In contrast to the long distance incumbents, the Department of Justice expressly recognizes that "the term 'such provider' in Track B should be interpreted with reference to the type of facilities based competition that would satisfy Track A." DOJ Br. 12. But it nonetheless claims that a carrier requesting interconnection need not actually fulfill the requirements of Track A either at the time that it makes its request or even at the time that a Bell operating company files its application. Id., 13. Instead, it argues, a Bell company can no longer proceed under Track B once it has "received requests for access and interconnection by qualifying potential facilities-based competitors" (id., vi) — that is, competitors stating that they seek to provide the type of facilities-based service to residential and business customers that would satisfy Track A. There are two problems with this argument.

First, the notion that competitors could block an application under Track B merely by claiming that they plan, in the future, to satisfy the criteria of Track A cannot be squared with the Act or the relevant legislative history. See Bell Atlantic Br. 11-12. On the contrary, this would require the Commission to effectively rewrite the "such provider" language in section 271(c)(1)(B) to say that Track B is only available absent a timely request from a carrier that "claims it will become such provider."

[2] As Congressman Tauzin explained, "[s]ubparagraph (B) uses the words 'such provider' to refer back to the exclusively or predominantly facilities based provider described in subparagraph (A)." 141 Cong. Rec. H8425-06, H8458 (daily ed. Aug. 4, 1995).

Second, a standard that turns solely on the stated intentions of the carriers requesting interconnection obviously would leave the Bell operating companies — not to mention the Congressional goal of increased long distance competition — hostage to the claims of competitors. The Department itself appears to recognize this problem, and explains that requesting carriers must at least "have manifested their intent to be facilities-based competitors and [be] working toward that goal." DOJ Br. 18 (emphasis added). For example, it suggests that they must have substantial facilities in place that they could use to provide local exchange service to business and residential customers, and must have manifested an intent to provide residential service through objective acts such as filing tariffs or conducting tests of residential service. DOJ Br. 18.

But these specific requirements — presuming they were expressly adopted by the Commission — still would not address the underlying problem. In actual practice, the subjective standard urged by the Department — as opposed to the objective standard in the Act — is subject to abuse and may well prove to be meaningless. For example, long distance companies undoubtedly would claim that the long distance facilities they have in place are enough to meet the Department's test, and, if conducting an internal test of residential service were enough to foreclose a Track B application, could readily conduct such a test even in the complete absence of any near term plans to actually provide such service. In contrast, the requirement set out in the Act, that the carrier requesting interconnection be the type of provider described in Track A, prevents this type of gamesmanship.

B. The Act's Standards For What a Bell Company Must Do To Qualify For Relief Also Are Clear

As for the separate issue of what a Bell company must show to qualify for relief, the long distance incumbents repeat their usual claims that each checklist item must be included in a single agreement, and that a Bell operating company must actually be furnishing each checklist item to that single competitor.

But contrary to the claims of the long distance incumbents, section 271(c)(2) is clear about what is required for the Bell company to demonstrate that its local market is sufficiently open to qualify for relief. See Bell Atlantic Br. 5-7. A Bell operating company meets the requirements of subparagraph (A) if it is "providing" access and interconnection under "one or more agreements," "or" it is "generally offering" access and interconnection under a statement of generally available terms. And it meets the requirements of subparagraph (B) if the access and interconnection being "provided or generally offered" includes each of the 14 items in the checklist set out in that section. On its face, therefore, this provision expressly allows the Bell operating companies to satisfy the checklist through one or more agreements, or through a combination of agreements and a statement, so long as all the items on the checklist are available through one or the other.

To the extent the long distance incumbents claim otherwise, their arguments confuse the standard for when a Bell company can file, § 271(c)(1), with the separate requirement that it be providing or generally offering the items on the checklist, § 271(c)(2). But there simply is no statutory link between the method for showing checklist compliance under paragraph (c)(2) and the track available under paragraph (c)(1). Rather, a Bell company must show that it is

providing or generally offering the items on the checklist. Separate from that, it must show either that there is a certain type of competitor operating in the state under an approved interconnection agreement or that no such competitor has made a timely request for interconnection — Track A or Track B. But whether it follows one track or the other for purposes of determining when it can file has nothing to do with how it demonstrates that it has satisfied the checklist.

Nor does the result urged by the long distance incumbents make any practical sense. If a Bell company were not allowed to demonstrate compliance with the checklist through more than one agreement, or through a combination of agreements and a statement, it could readily find itself caught in a procedural Catch 22 — having fully opened its network, yet with no way into the long distance business. So long as no competitor chose to include all the checklist items in their agreements, a Bell company could never meet the checklist. To make sure this could not happen, the Act expressly allows a Bell company to demonstrate compliance with section 271(c)(2) through a statement of terms, and to do so independent of how it complies with section 271(c)(1).

The long distance incumbents fare no better to the extent they claim that a Bell operating company filing under Track A must actually be furnishing each of the checklist items to a qualifying competitor. See Bell Atlantic Br. 7-8. As the Department of Justice explains, the relevant test for purposes of determining checklist compliance is not whether competitors have chosen to actually use each item on the checklist, but whether each of the items is "available." DOJ Br. 23. Indeed, this is the only standard compatible with the express terms of the Act. Because a principal definition of "provide" is "to make available," Random House

Unabridged Dictionary (2d ed.), the Act by its terms makes clear that a Bell company either must make available, or generally offer to make available, each of the items on the checklist.

II. Efforts To Add New Requirements To Those Imposed By Congress Must Be Rejected

A. The Competitive Checklist Cannot Be Expanded to Require Fully Automated Access to Operations Support Systems

Despite an express statutory prohibition against expanding the terms of the competitive checklist, § 271(d)(4), the long distance incumbents, joined for the first time here by the Department of Justice, urge the Commission to add a new term to the checklist, and to require that the Bell companies provide, at least in some circumstances, fully automated access to their operations support systems. This requirement has no basis in the statute.

On the contrary, while the Commission has concluded that incumbent carriers must provide non-discriminatory access to their existing operations support systems, it also has made it clear that they may do so in any way that allows competitors to provide service in "substantially the same time and manner" that the incumbent provides service to its own customers. Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Dkt No. 96-98, First Report and Order, ¶ 518 (Aug. 8, 1996) ("Local Interconnection Order").[3] So long as a Bell company can demonstrate that it has processes in place that are reasonably designed to meet this standard, there simply is no rational reason to

[3] The Commission found in August 1996 "that incumbent LECs . . . have made significant progress" in "modifying their networks to provide requesting carriers access to OSS functions." Local Interconnection Order, ¶ 525. Four months later, the FCC pointedly noted that it was "encouraged by reports that this progress has continued." Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Dkt. No. 96-98, Second Order on Reconsideration at ¶ 10 (Dec. 13, 1996).

deny it long distance relief solely because its internal systems for processing orders (once they have been received from a competitor) may, in some instances, require a degree of manual intervention.

B. The Public Interest Standard Is Not a Broad License to Add Requirements That Are Unrelated to the Long Distance Authority Being Sought

The long distance incumbents and the Department of Justice also join together in arguing that the Commission should convert the "public interest" standard into a broad license to add new local competition standards to the requirements of the Congressionally-specified checklist. Their argument must be rejected.

The most basic problem with the argument is simple: It is fundamentally inconsistent with the carefully specified and exhaustive competitive checklist adopted by Congress (after extensive legislative negotiations and compromise), § 271(c)(2)(B), and with the express statutory command that the Commission may not add to (or subtract from) the terms of that checklist, § 271(d)(4). These provisions together make it abundantly clear that Congress pointedly decided itself to specify the required local competitive conditions necessary to obtain long distance relief, precisely to avoid the sort of open-ended inquiry that these parties seek to reintroduce.[4] As a result, the Department's position violates basic principles of statutory construction demanding that a statute be read to give coherence to the whole statute: that one

[4] The Department recognizes the problem presented by this inconvenient aspect of the statute, and attempts to explain it away by reading the command not to "limit or extend the terms used in the competitive checklist," § 271(d)(4), to mean nothing but "follow the checklist." DOJ Br. 37 n.44. But that construction improperly reads the provision out of the Act (see, e.g., Ratzlaf v. United States, 114 S.Ct. 655, 659 (1994)) and ignores its reason for being there: A considered judgment that the checklist fully exhausts the subject it addresses, namely, the openness of local markets to competition.

provision cannot be read to negate, contradict, or undermine others;[5] and that specific provisions addressing a particular issue (here, the openness of local markets) should not be displaced by a broad interpretation of other provisions.[6]

Moreover, the substance of the Department's position is incompatible with other critical indicators of Congressional intent. First, while the Department casts its rhetoric here in the guise of ensuring that local markets are "irreversibly opened to local competition," its specific argument that competitors must be operating on a commercial scale is precisely the type of actual competition standard that Congress expressly rejected, see Bell Atlantic Br. 3-5 (and authorities cited therein).

Second, the focus of the public interest inquiry cannot properly be placed on the local market. The only inquiry the Commission is authorized to undertake by the Act is whether "the requested authorization" — that is, the ability to provide in-region long distance service — is in the public interest. As a result, the relevant focus of the public interest inquiry is on the market the Bell company seeks authority to enter — namely, long distance — rather than on the local market. In fact, the Conference Report's reference to possible "standards" for the Attorney General's own evaluation focuses on the market to be entered in each of the specific examples it gives. Conf. Rep. 149. Because the Department's position is not focused on the long distance market, it is error for this reason alone.

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[5] See, e.g., United Sav. Ass'n v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 371 (1988); Grade v. National Solid Wastes Mgt. Ass'n, 112 S.Ct. 2374, 2384 (1992).

[6] See, e.g., Custis v. United States, 114 S.Ct. 1732, 1736 (1994); John Hancock Mut. Life Ins. Co. v. Harris Trust & Savings Bank, 114 S.Ct. 517, 524 (1993); West Virginia Univ. Hosp., Inc. v. Casey, 449 U.S. 83, 92 (1991); Green v. Block Laundry Mach., Co., 490 U.S. 504, 524-26 (1989).

But the Department's position is in fact even more breathtakingly extreme because it is not tied in any way to the avoidance of a harm that the requested authority would supposedly cause. Instead, the Department proposes to use the "public interest" standard as leverage to obtain something else that the Commission may deem to be a public good — faster development of local competition — even though the Department standard is pointedly unrelated to the long distance authority being sought. Its principal justification for doing so is the claim that a Bell company's "incentive" to open its local market will allegedly be diminished once it receives long distance relief. Even apart from the fact that the Commission has other tools at its disposal to address this concern,[7] this argument simply proves too much for it would allow any requested approval under a "public interest" standard to be withheld solely to extract some unrelated benefit.[8]

Nor can this extreme result be justified by the only other rationale offered by its proponents — namely, the claim that this result is necessary to give meaning to the "public interest" standard and to the Attorney General's advisory role. DOJ Br. 18 & n.46. That contention is incorrect: There is in fact a sensible, meaningful role that does not contradict the

[7] Among other things, the Act expressly authorizes the Commission to revoke a Bell company's long distance authority at any time if it "has ceased to meet any of the conditions required for" long distance entry, § 271(d)(6). And, of course, the various enforcement mechanisms available to the Commission are backed up by the federal and state antitrust laws, § 601(b)(1), including the availability of treble damages.

[8] Cf. In the Matter of Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes, Report & Order, 5 FCC Rcd 3911, ¶10 (1990) (changing policy of permitting license applicants to pay money to commenters in exchange for dropping objections because this policy permits commenters "to reap benefits that are unrelated to the operation of the station in the public interest").

commands of the checklist or the ban against expanding the checklist, and that gives the entirety of section 271 a coherent construction.

Specifically, a more reasonable interpretation of the "public interest" standard in section 271(d)(3)(C) is that it allows the Commission to ensure compliance with other policies of the Communications Act that relate to long distance, and not to the opening of markets to competition, the latter subject having been exhausted by the first two Congressionally-specified requirements (compliance with the checklist and with the requirements of section 272). For example, the Act embodies policies relating to the promotion of universal long distance service, as reflected in the rate averaging and rate integration requirements in section 254(g). By including the public interest standard in the Act, Congress empowered the Commission to undertake such inquiry as may be needed to ensure that these other policies embodied in the Act are not undermined — for example, by an application that proposes to offer long distance service only in limited high-density areas in a state.[9]

And the Department fares no better to the extent it relies upon the provision defining the role of the Attorney General. Specifically, section 271(d)(2)(A) provides that the Attorney General may conduct an "evaluation" of an application using any standard, and that the Commission is to give "substantial weight" to that "evaluation." As the Conference Report confirms, however, this is merely an "administrative" provision that is procedural in its terms.

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[9] Reading the public interest standard to focus on these other policies of the Act not only avoids an internal contradiction in the statute, but also gives the provision a meaningful role that is consistent with the traditional one under the long-standing "public interest" standard of sections 214 and 310(d). In fact, the Commission itself has recognized that the Act embodies policies such as universal service that require careful consideration to ensure they are not undermined by otherwise presumptively pro-competitive new entry. See In re MTS and WATS Market Structure, 81 F.C.C.2d 177, ¶¶ 50-79 (1980).

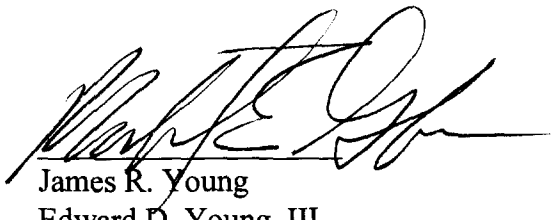
Conf. Rep. 149. While that provision allows the Attorney General to do what she is institutionally suited to do — evaluate the long distance authorization being sought and to pass that assessment along to the Commission — it cannot alter the substantive standards that govern the Commission's own determination. In particular, it cannot override the commands of the competitive checklist or the statutory prohibition against expanding that checklist. And because the only role assigned to the Attorney General is to "consult" with the Commission in making its determination, it would make nonsense of the Act to suggest that the Attorney General could use a standard that is incompatible with the limits imposed by the Act on the Commission itself.

Nor, finally, can broad invocations of a statutory "purpose" to promote competition substitute for, or overcome, the careful compromises reflected in the statute itself. Compare DOJ Br. 39-40. "Invocation of the 'plain purpose' of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of legislative intent." Board of Governors v. Dimension Financial Corp., 474 U.S. 361, 374 (1986); see Rodriguez v. United States, 480 U.S. 522, 525-26 (1987). Congress specified the checklist as the limit of inquiry into the openness of local markets. A demand for additional requirements on that subject defeats, rather than respects, Congressional intent.

In short, the reading of section 271 outlined above is the only one that gives every part meaning that fits sensibly with all other parts, as required by basic cannons of statutory construction. See, e.g., Dep't of Revenue of Oregon v. ACF Industries, 510 U.S. 332, 340-341 (1994). By contrast, the Department's reading would violate the fundamental obligation of

courts (and agencies) to make "sense rather than nonsense" out of the entire relevant law, (West Virginia Univ. Hosp., 449 U.S. at 92), and must be rejected.

Respectfully submitted,



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